

Supreme Court No. 82238-7

Court of Appeals No. 36928-1-II

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

---

STATE OF WASHINGTON,

Respondent,

vs.

**Patricia Schultz,**

Appellant.

---

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
2009 MAY -1 AM 7:47  
CLERK  
BY RONALD R. CARPENTER

Clallam County Superior Court Cause No. 05-1-00114-2

The Honorable Judge Kenneth D. Williams

**Petitioner's Supplemental Brief**

Manek R. Mistry

Jodi R. Backlund

Attorneys for Appellant

**BACKLUND & MISTRY**

203 East Fourth Avenue, Suite 404

Olympia, WA 98501

(360) 352-5316

FAX: (866) 499-7475

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
STATEMENT OF FACTS AND PRIOR PROCEEDINGS.....	3
ARGUMENT.....	6
<b>I.    The police violated Wash. Const. Article I, Section 7           when they invaded Patricia Schultz's home without           authority of law. ....</b>	<b>6</b>
A.    Officer Malone's warrantless entry did not fall within the community caretaking exception to the warrant requirement. ....	8
B.    Officer Hill's warrantless entry (after both officers had confirmed that no domestic violence had occurred) did not fall within the community caretaking exception to the warrant requirement. ....	9
<b>II.    The Court of Appeals misread the record and           misapplied the law when it affirmed Ms. Schultz's           conviction. ....</b>	<b>10</b>
A.    The Court of Appeals' recitation of the facts is misleading. ....	10
B.    The officers did not encounter exigent circumstances because there was no indication of domestic violence. ....	11
C.    Ms. Schultz did not consent to the officers' warrantless entry. ....	12
CONCLUSION .....	14

## **TABLE OF AUTHORITIES**

### **WASHINGTON CASES**

<i>State v. Day</i> , 161 Wn.2d 889, 168 P.3d 1265 (2007) .....	7
<i>State v. Eisfeldt</i> , 163 Wn.2d 628, 185 P.3d 580 (2008) .....	7
<i>State v. Ferrier</i> , 136 Wn.2d 103, 960 P.2d 927 (1998) .....	7
<i>State v. Grande</i> , 164 Wn.2d 135, 187 P.3d 248 (2008) .....	7
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986) .....	6
<i>State v. Johnson</i> , 104 Wn. App. 409, 16 P.3d 680 (2001) .....	12
<i>State v. Leffler</i> , 142 Wn.App. 175, 178 P.3d 1042 (2007) .....	7, 10
<i>State v. Lynd</i> , 54 Wn. App. 18, 771 P.2d 770 (1989) .....	12
<i>State v. Parker</i> , 139 Wn.2d 486, 987 P.2d 73 (1999) .....	6
<i>State v. Raines</i> , 55 Wn. App. 459, 778 P. 2d 770 (1989) .....	12
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004) .....	13
<i>State v. Thompson</i> , 151 Wn.2d 793, 92 P.3d 228 (2004) .....	7, 8, 9, 10, 12
<i>State v. White</i> , 135 Wn.2d 761, 958 P.2d 962 (1998) .....	6

### **CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. IV .....	i, 6
Wash. Const. Article I, Section 7 .....	i, 6, 7, 9, 10

### **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

An argument between Patricia Schultz and Sam Robertson prompted a neighbor to call the police and complain that a man and a woman were yelling at each other. RP (8/2/05) 12, 26, 60. Officers Malone and Hill went to Ms. Schultz's apartment and stood outside listening. RP (8/2/05) 11-13, 25. They heard a man and woman "talking loudly." The man said he wanted to leave, and needed some space. RP (8/2/05) 13, 46. Officer Hill said the man spoke in a raised voice, but did not yell. RP (8/2/05) 61.

The officers knocked and Ms. Schultz opened the door. RP (8/2/05) 14. When asked, she told the officers no one else was there. RP (8/2/05) 14. After the officers said they'd heard a man's voice, Ms. Schultz "stepped back" and "called for Sam," who emerged from a room in the back of the apartment. RP (8/2/05) 14-15. As Mr. Robertson came to the door, Ms. Schultz opened it wider and stepped back, and Officer Hill took Mr. Robertson outside. RP (8/2/05) 63.

Officer Malone then entered the apartment uninvited. RP (8/2/05) 15, 77-78. According to Officer Malone, she did not tell Ms. Schultz of her right to prevent entry because "I was going in to talk to her." RP

(8/2/05) 28. Once inside, the officer did not see any signs of violence. RP (8/2/05) 29, 52-53.

Ms. Schultz appeared agitated and flushed, and she moved around the apartment picking up various items. Officer Malone ordered her to sit at the table. RP (8/2/05) 16, 56. Ms. Schultz explained that her neck gets red when she is upset, and told the officer several times that the couple had been arguing verbally only, not physically. RP (8/2/05) 17-18, 32, 35.

Officer Malone described Ms. Schultz as fidgeting while seated at the table, and the officer told her to sit still, and threatened to handcuff her. RP (8/2/05) 18-19, 30-31. Officer Malone testified that this warning—that Ms. Schultz might be handcuffed—occurred early in their interaction. RP (8/2/05) 29-30. Ms. Schultz repeatedly asked the officer if she could get up, and was refused permission. RP (8/2/05) 45. Officer Malone testified that she intended to talk with Ms. Schultz even if Ms. Schultz did not want to talk with her. RP (8/2/05) 45.

Meanwhile, Officer Hill stood in the open doorway, and spoke to Mr. Robertson (who he'd brought out to the porch). RP (8/2/05) 63. Officer Hill learned quickly that no violence had taken place. RP (8/2/05) 79, 82. After confirming there had been no violence, Officer Hill went into the apartment to speak with Malone. Hill saw Ms. Schultz move an item on the table, revealing a gun and a pipe. RP (8/2/05) 19, 65-68.

Officer Hill asked Ms. Schultz about the gun, seized it and unloaded it, and then asked her about the pipe. RP (8/2/05) 19-21, 67. Ms. Schultz told him the pipe was her son's, but that she had known it was on the table. RP (8/2/05) 21, 68. Officer Hill asked if he could search the very cluttered table for narcotics, and Ms. Schultz agreed, standing and grabbing at items. RP (8/2/05) 21, 39-40. Officer Malone stated that Ms. Schultz had not made any aggressive movements, and that she would not have let Ms. Schultz leave if she tried. Even so, Officer Malone handcuffed Ms. Schultz, telling her she was not under arrest. RP (8/2/05) 21-23, 38, 54.

At this point, Ms. Schultz asked for her anti-anxiety medication, and Mr. Robertson helped Officer Hill to find it and give it to Ms. Schultz. RP (8/2/05) 23, 42-43, 70. Ms. Schultz withdrew her permission for the officers to search the table, and was forced to wait while the officers obtained a telephonic warrant. RP (8/2/05) 24, 71. The officers then searched the entire apartment and discovered methamphetamine. CP 23.

Ms. Schultz was charged with Possession of Methamphetamine. CP 25. She demanded a 3.6 hearing, arguing that the initial entry was unlawful and that she was arrested without probable cause. CP 42-44, 52-53. The court admitted the evidence, concluding that

In order to ensure the safety of occupants, officers must talk to those possibly involved. ... They had the right, and duty, to be present to talk to the occupants. [N]either party told them to leave and... the defendant initially acquiesced to their entry, stepping back and opening the door further, and at no time told or asked them to leave.... [The officers] were performing their legal duties when they entered the apartment to investigate a possible domestic violence situation. Their entry was legal and even required under state law.  
CP 23-24.

Ms. Schultz was convicted as charged after a stipulated trial, and she appealed. CP 6-19, 5. The Court of Appeals affirmed her conviction in an unpublished opinion dated September 16, 2008.

## **ARGUMENT**

### **I. THE POLICE VIOLATED WASH. CONST. ARTICLE I, SECTION 7 WHEN THEY INVADED PATRICIA SCHULTZ'S HOME WITHOUT AUTHORITY OF LAW.**

Article I, Section 7 of the Washington State Constitution provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. Article I, Section 7.<sup>1</sup>

---

<sup>1</sup> It is "axiomatic" that Article I, Section 7 provides stronger protection to an individual's right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). Accordingly, the six-part *Gunwall* analysis used to interpret state constitutional provisions is not necessary for issues relating to Article I, Section 7. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

The provision applies with greatest force when officers intrude into a dwelling. *State v. Ferrier*, 136 Wn.2d 103, 112, 960 P.2d 927 (1998).

Searches conducted without a warrant are presumed to be unconstitutional. Wash. Const. Article I, Section 7; *State v. Grande*, 164 Wn.2d 135, 141, 187 P.3d 248 (2008). Exceptions to the warrant requirement are narrowly drawn and jealously guarded. *State v. Day*, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007). The state bears the heavy burden of showing that an exception applies. *State v. Eisfeldt*, 163 Wn.2d 628, 584, 185 P.3d 580 (2008).

In very limited circumstances, officers may enter a home to provide emergency aid as part of their “community caretaking” function. *State v. Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228 (2004). An intrusion under the emergency exception is permitted “only if (1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place being searched.” *Thompson*, at 802.

The exception applies only “where there is an imminent threat of substantial injury....” *State v. Leffler*, 142 Wn.App. 175, 184, 178 P.3d 1042 (2007). Furthermore, the officers must reasonably believe that a



specific person or persons need immediate help for health or safety reasons. *Leffler*, at 182.

- A. Officer Malone's warrantless entry did not fall within the community caretaking exception to the warrant requirement.

Officer Malone entered Ms. Schultz's apartment to investigate a neighbor's complaint that the couple had been yelling. RP (8/2/05) 12, 26. At the time she made her warrantless entry, Malone lacked even a subjective belief that someone needed immediate help, or that there was an imminent threat of substantial injury. In addition, even any subjective belief would not have been objectively reasonable. Under the circumstances, Malone's entry did not fit within the emergency aid exception, as outlined in *Thompson, supra*.

Malone's desire to investigate<sup>2</sup> did not give her license to enter Ms. Schultz's apartment without a warrant. Furthermore, nothing prevented Malone from asking both parties to step outside (where they could be interviewed separately and kept apart from each other). Nor was there any obstacle to interviewing Ms. Schultz from the doorway—without entering

---

<sup>2</sup> Her curiosity was apparently aroused by three facts: (1) that the couple had been yelling, (2) that Ms. Schultz appeared upset, and (3) that Ms. Schultz initially denied Mr. Robertson was present. RP (8/2/05) 12, 14-16, 26, 60. Whether these three facts gave rise to even a reasonable suspicion of criminal activity is questionable.

the apartment—while Officer Hill interviewed Mr. Robertson on the porch.

Malone's warrantless entry violated Ms. Schultz's constitutional right to privacy under Wash. Const. Article I, Section 7. The Court of Appeals' decision must be reversed, the evidence suppressed, and the case dismissed. *Thompson, supra*.

- B. Officer Hill's warrantless entry (after both officers had confirmed that no domestic violence had occurred) did not fall within the community caretaking exception to the warrant requirement.

When Officer Hill entered the home to confer with Malone, both had confirmed that no domestic violence occurred. There were no additional facts suggesting an emergency requiring Hill's presence in the house. Furthermore, Malone was in the front room where she could communicate with Hill even if the latter remained outside the home.

Accordingly, Hill (like Malone) lacked even a subjective belief his immediate help was needed to address an imminent threat of substantial injury. Furthermore, any such belief would have been objectively unreasonable. Hill's warrantless entry did not fall within the community caretaking exception to the warrant requirement. *Thompson, supra*.

Under these circumstances, Hill's entry<sup>3</sup> violated Ms. Schultz's constitutional right to privacy under Wash. Const. Article I, Section 7. *Thompson, supra; Leffler, supra.* The Court of Appeals' decision must be reversed, the evidence suppressed, and the case dismissed. *Thompson, supra.*

**II. THE COURT OF APPEALS MISREAD THE RECORD AND MISAPPLIED THE LAW WHEN IT AFFIRMED MS. SCHULTZ'S CONVICTION.**

**A. The Court of Appeals' recitation of the facts is misleading.**

The Court of Appeals begins its statement of facts by quoting testimony that the officers were responding to a "possible domestic disturbance of male and female yelling and arguing...." Opinion, p. 1. The phrase "domestic disturbance" is misleading to the extent it implies that the neighbor overheard anything suggesting domestic violence. RP (8/2/05) 12, 26, 36. Furthermore, the court should have noted that the neighbor's call was a complaint about the noise rather than a request for investigation of a crime. RP (8/2/05) 36.

The court also claims (without citation to the record) that "[a]s Schultz stepped away from the door, Malone *followed her* inside."

---

<sup>3</sup> Hill's warrantless entry led to discovery of the gun and paraphernalia, which prompted additional investigation (including the decision to obtain a telephonic warrant.)

Opinion, p. 2 (emphasis added). This is incorrect: Ms. Schultz stepped away from the door to allow Mr. Robertson to exit and speak with Officer Hill outside the apartment. RP (8/2/05) 14-15. She did not retreat into the apartment or otherwise indicate that it was acceptable for Officer Malone to cross the threshold to “follow” her. RP (8/2/05) 50.

The court characterizes Ms. Schultz’s red and blotchy skin as “an indication of a possible assault.” Opinion, p. 2. Neither of the officers testified that her red and blotchy skin was an indication of a possible assault, and it was immediately and plausibly explained. RP (8/2/05) 17. This conclusion appears to belong entirely to the Court of Appeals.

The court also glosses over Officer Hill’s warrantless entry into the residence: “When Hill came into the apartment to confer with Malone....” Opinion, p. 3. In fact, there was no need for Hill to enter the apartment to confer with Malone. The two officers could have conferred outside the residence, or Hill could have remained in the doorway.

B. The officers did not encounter exigent circumstances because there was no indication of domestic violence.

The Court of Appeals erroneously claims the officers responded to a neighbor’s call “reporting possible domestic violence....” Opinion, p. 8. But there was no indication of domestic violence, either in the neighbor’s phone call or in the argument the officers heard when they approached the

apartment. RP (8/2/05) 11-13, 26, 46, 50, 61. A reasonable person would not have believed Ms. Schultz needed assistance of any sort. Furthermore, providing assistance did not require either officer to cross the threshold of the apartment.

This case is easily distinguished from the cases cited in the Opinion. As the court itself notes, prior cases authorizing warrantless entry to provide emergency aid were based on clear and specific reports of domestic violence, combined with facts suggesting violence had occurred. *See* Opinion, pp. 7-8 (citing *State v. Johnson*, 104 Wn. App. 409, 16 P.3d 680 (2001); *State v. Raines*, 55 Wn. App. 459, 778 P. 2d 770 (1989); *State v. Lynd*, 54 Wn. App. 18, 771 P.2d 770 (1989)).

The Court of Appeals' analysis rests on a mischaracterization of the underlying facts, coupled with a misunderstanding of the narrow exception that permits warrantless entry in true emergencies. Had the court properly analyzed the facts and properly applied the emergency exception, it would have reversed the conviction and suppressed the evidence. *Thompson, supra*.

C. Ms. Schultz did not consent to the officers' warrantless entry.

Although the Court of Appeals did not rely on consent to justify the warrantless entry, it alluded to Ms. Schultz's alleged consent as "additional support for the trial court's conclusion that the officers' entry

was legal.” Opinion, p. 9-10. Apparently, the court was not sufficiently confident of its analysis to allow the emergency exception to stand on its own as justification for the warrantless entry.

Warrantless entries based on consent are evaluated under a totality-of-the-circumstances test. *State v. Reichenbach*, 153 Wn.2d 126, 132, 101 P.3d 80 (2004). The state must demonstrate voluntariness by proving such things as whether *Miranda* warnings were given, the degree of education and intelligence of the consenting person, and whether the consenting person was advised of her or his right to refuse consent. *Reichenbach*, at 132.

The record is devoid of any information bearing on the voluntariness of Ms. Schultz’s purported consent, and the trial court did not find that she voluntarily consented. CP 29-31. Although Ms. Schultz stepped aside and opened the door wider, she did so at first to allow Mr. Robertson to speak to the officers from the rear of the apartment, and then to allow him to walk outside to talk to Officer Hill. RP (8/2/05) 14-15, 65. The fact that Officer Malone took advantage of this opportunity to walk inside the apartment does not mean that Ms. Schultz voluntarily consented to the entry.

In the absence of sufficient evidence to show (under the totality of the circumstances) that Ms. Schultz’s purported consent was voluntary,

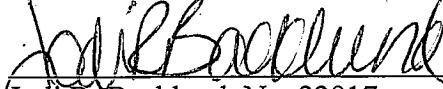
the Court of Appeals should not have relied on “consent” to provide support for its position. This is especially true given that the trial court failed to examine the totality of the circumstances or to make a factual finding that Ms. Schultz voluntarily consented to the warrantless entry.

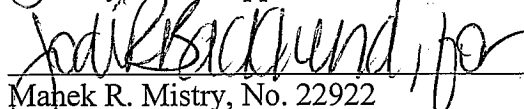
### **CONCLUSION**

It is not a crime for people to argue, to raise their voices, or to declare their need for “space” from each other. Nor does such conduct—even when combined with an upset demeanor and an obvious lie about one’s partner’s presence—give rise to a reasonable belief that someone needs immediate assistance to prevent an imminent threat of substantial injury. Officer Malone violated Ms. Schultz’s right to privacy by entering the apartment without a warrant. Officer Hill compounded the violation when he entered after both officers had already confirmed that no domestic violence had occurred. The Court of Appeals decision must be reversed, the evidence suppressed, and the case dismissed with prejudice.

Respectfully submitted on April 30, 2009.

**BACKLUND AND MISTRY**

  
\_\_\_\_\_  
Jodi R. Backlund, No. 22917  
Attorney for the Appellant

  
\_\_\_\_\_  
Mahek R. Mistry, No. 22922  
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of Petitioner's Supplemental Brief to:

Patricia Schultz  
3035 5<sup>th</sup> Ave. #A-1  
Sequim, WA 98382

and to:

Clallam County Prosecuting Attorney  
223 E. 4th Street, Suite 11  
Port Angeles WA 98362-014

And that I sent the original and one copy to the Washington State Supreme Court for filing;

All postage prepaid, on April 30, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 30, 2009.

A handwritten signature in black ink, appearing to read "Jodi R. Backlund", written over a horizontal line.

Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant